94 dated January 11, 1965 and deliver the same to the chargor/respondent or his solicitors; and that failing the same, the Senior Assistant Registrar, High Court, Kuala Lumpur, be empowered to execute the said memorandum of discharge for and on behalf of the said chargee/applicant;

(3) there will be no order as to costs.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Segaram & Co.*

RAMLI BIN SALLEH v. INSPECTOR YAHYA BIN HASHIM

[O.Cr.J. (Syed Agil Barakbah J.) August 19, 1972]

[Alor Star — Originating Motion No. 18 of 1972]

Constitutional Law — Right to consult legal practitioner by person arrested — Whether right commences immediately after arrest or within a reasonable time before police investigation is completed — Criminal Procedure Code (Cap. 6), ss. 28, 117 and 255 — Federal Constitution, art. 5.

In this case the applicant had been arrested by the police on the strength of a report of theft. After being produced before a magistrate he was remanded for a period of eleven days in police custody. An application was made by an advocate and solicitor who had been appointed to act for the applicant, for an opportunity to see the prisoner for consultation. This was refused and the respondent stated that the advocate and solicitor could see the applicant after the completion of the remand period. An application was thereupon made for *habeas corpus* but before the matter was brought to court the applicant had been released. The learned judge held that the question which arose in the case was of considerable importance and public interest and that it was proper for him to make a ruling thereon. The question was whether the right of a person who is arrested and remanded in police custody to consult and be defended by a legal practitioner of his own choice commences immediately after arrest or within a reasonable time before police investigation is completed.

Held: (1) the right of a person who is arrested and remanded in police custody, to consult and be defended by a legal practitioner of his own choice as envisaged in article 5(3) of the Constitution begins right from the day of his arrest even though police investigation has not yet been completed;

(2) in order to satisfy the constitutional requirement of article 5(1) of the Constitution that right should be subject to certain legitimate restrictions which necessarily arise in the course of police investigation, the main object being to ensure a proper and speedy trial in the court of law;

(3) such restrictions may relate to time and convenience of both the police and the person seeking the interview and should not be subject to any abuse by either party;

(4) in order to render such interview effective it should be held not within the hearing of any member of the police though within their sight;

(5) the action of the respondent in this case in restricting the learned counsel's application to interview his client on the expiry of the detention period was unreasonable;

(6) the police should not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

[Editorial Note: The learned judge in this case after making the ruling referred the matter for the opinion of the Federal Court under section 48 of the Courts of Judicature Act, 1964. The Federal Court (Federal Court Special Case No. 1 of 1972, Ong C.J., Suffian, Gill, Ali and Ong Hock Sim F.JJ.) on October 2, 1972, unanimously refused to give an opinion, saying that the Federal Court under section 48 had no jurisdiction to determine abstract matters or matters of academic interest such as disclosed in the reference. Suffian F.J. thought that the learned judge when making the ruling, was already *functus officio* and that he should not have made it. Ong Hock Sim F.J. considered that as the prisoner was already released, the ruling was uncalled for as the matter had become purely an academic exercise. No written judgment of the Federal Court was delivered.

The refusal of the Federal Court to deal with the reference renders the guide-line enunciated by the learned judge merely *obiter*. Reference may be made to the article on "Right of an Arrested person to Consult Counsel" by Tan Sri Mohamed Salleh Abas ([1972] 2 M.L.J. lxiii) and the article "When does the Right of an Arrested Person to Consult Counsel under article 5(3) of the Federal Constitution Begin?" by Karpal Singh, to be published in the next issue of the *M.L.J.*]

Cases referred to:-

(1) *Lee Mau Seng* v. *Minister of Home Affairs Singapore* [1971] 2 M.L.J. 137.

(2) *Moti Bai* v. *The State* A.I.R. 1954 Rajasthan 241.

(3) *In re Llevelyu Evans* A.I.R. 1926 Bonn. 551.

(4) *Sunder Singh* v. *Emperor* A.I.R. 1930 Lahore 945.

(5) *Assa Singh* v. *Menteri Besar, Johore* [1967] 2 M.L.J. 30.

ORIGINATING MOTION.

Karpal Singh for the applicant.

Datuk Tunku Mokhtar (Legal Adviser) for the respondent.

Syed Agil Barakbah J. (delivering his ruling): This is an application for a writ of *habeas corpus* at the instance of the applicant, the father-in-law of the prisoner. The prisoner was arrested on August 8, 1972, by the police on the strength of a report regarding the theft of an electric engine. He was produced within twenty-four hours before a magistrate who ordered that he be remanded for a period of eleven days under section 117 of the Criminal Procedure Code (F.M.S. Cap. 6) on being satisfied that investigation would not be completed within twenty-four hours. On August 9, 1972, an application was made by Mr. Karpal Singh, an advocate and solicitor, who had been approached by the applicant to act for the prisoner, for an opportunity to see the prisoner for consultation as soon as possible. The respondent replied that he could see the prisoner on August 19, *i.e.* after the completion of the remand period. Thus, from the day of arrest until the completion of the remand period the prisoner would not be given the opportunity of consulting his counsel.

When the application came before me Mr. Karpal Singh informed the court that the prisoner had been released, but owing to the importance of the issue raised, and the absence of any ruling on it, he requested me to hear his argument and make a ruling thereon. The Legal Adviser, Datuk Tunku Mukhtar, who appeared for the respondent, replied that since the prisoner had been released the application for *habeas corpus* no longer arose and therefore it was not necessary for the court to consider the application.

To my mind, the question that has to be decided is one of considerable importance and of public interest

since it concerns the fundamental liberty of the subject under article 5 of the Federal Constitution. There being to my knowledge, as confirmed by both learned counsel, no ruling so far on the matter, it is only proper for me to consider the issue and make a ruling thereon. Both counsel agreed that the application for *habeas corpus* should be dropped in the circumstances.

Article 5 of the Constitution says as follows: —

"5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

(5) Clauses (3) and (4) do not apply to any enemy alien."

With regard to clause (3) of article 5, it may be divided into two limbs, namely: —

(1) that a person arrested shall be informed as soon as may be of the grounds of his arrest; and

(2) that he shall be allowed to consult and be defended by a legal practitioner of his choice.

I am now concerned with the second limb.

The question before this court is whether the right of a person who is arrested and remanded in police custody to consult and be defended by a legal practitioner of his own choice commences immediately after arrest or within a reasonable time before police investigation is completed.

Before deciding this question, it is proper to examine the relevant provisions of the Criminal Procedure Code (F.M.S. Cap. 6) and compare them with article 5 of the Constitution. The Code came into force long before the Constitution and has been applied ever since until the present time. Section 28 which allows a police officer arresting a person without a warrant to keep him in custody for a period of not more than twenty-four hours except by special order of a magistrate under section 117 which allows the person to be detained in police custody for a period not exceeding fifteen days in order to enable investigation to be completed, is also embodied now under clause (4) of article 5 of the Constitution. Chapter XXXVI of the Code which empowers the court of a judge to make certain directions of the nature of *habeas corpus* has been re-enacted with the same effect by clause (2) of article 5 of the Constitution. Similarly, section 255 of the Code which gives the right to an accused person to be defended by an advocate before any criminal court has now been amplified by clause (3) of article 5 of the Constitution. In short, the provisions of the Code are analogous with those of the Constitution.

It was urged by Mr. Karpal Singh that the right to consult a counsel of one's choice accrues immediately on arrest. On the other hand, Datuk Tunku Mukhtar submitted that such right is available while the prisoner is in custody subject to certain restrictions so as not to interfere or jeopardise police investigation. There being no local authority on all fours on the matter, as I have stated earlier, I would have recourse to other authorities.

Now, the language of clause (3) of article 5 of the Constitution says in clear and simple words that if a person who is arrested wishes to consult a legal practitioner of his own choice, he is entitled to have this constitutional right granted to him by the authority who has custody of him after his arrest. This right must be granted within a reasonable time after his arrest. (*Per* Wee Chong Jin C.J. in *Lee Mau Seng* v. *The Minister of Home Affairs, Singapore, & Anor.*[1]).

The case of *Moti Bai* v. *The State*[2] concerns a similar question touching article 22(1) of the Constitution of India. This was a reference by the learned sessions judge, Jodhpur, which raised an important point as to the right of a counsel to consult an accused person who is in police custody and to interview the accused out of the hearing of the police though in their presence. The facts are almost on all fours with the present case. The provision of article 22(1), though differently worded, has the same effect as clause (3) of article 5 of our Constitution. It was held, *inter alia*, in order that this right "to consult a legal practitioner of one's choice" can properly and reasonably be given effect to, it must follow that such legal practitioner must be allowed the facility to consult the accused whom he seeks to defend. If such consultation is to be useful, it must be allowed without the hearing of the police though in their presence. The right of the accused enshrined in the article begins right from the day of his arrest. Modi J. also concluded that the position at that date was crystal clear that the learned counsel for the accused was within his rights to consult the accused ever since she was put under arrest and that the police were not right in not allowing such consultation which seemed to have been their attitude throughout.

It may be worth mentioning that even prior to the introduction of the Constitution of India, the High Courts in India have held in favour of the subject in police custody by according him the right to consult counsel under the provisions of their Criminal Procedure Code. I need only mention two decided cases, namely, *In re Llewelyn Evans*[3] and *Sundar Singh* v. *Emperor*,[4] which concern an application for *habeas corpus* and the facts of which are quite similar to the present case. In the first case the contention that such access to consult a legal practitioner should not have been given until police investigation was complete was not accepted. It was held that section 340 of the Indian Criminal Procedure Code contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings are actually going on but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence, unless there are exceptional circumstances. (Section 340 is similar to section 255 of our Code).

In the second case it was held in the interest of justice that an accused person should have access to legal advice even while he is in police custody under section 167 of the Indian Criminal Procedure Code. (This section is similar to section 117 of our Code).

Taking into consideration the provisions of our Criminal Procedure Code on the matter and in the light of the relevant authorities cited above, it is my considered opinion that the position in our country might well be the same in the pre-Constitutional days had the issue been brought up. With the coming into force of our Constitution enshrined in article 5, the right must be put on the highest footing. Article 5 should be read and construed in the simple and straightforward manner as it is written. That appeared to have been done in the Federal Court in *Assa Singh* v. *Mentri Besar, Johore*[5] by Azmi L.P. That was a reference under section 48 of the Courts of Judicature Act, 1964, on the question whether the provisions of the Restricted Residence Enactment (Cap. 39) authorising the detention and/or the deprivation of the liberty of movement was contrary to the provisions of the Federal Constitution and void. In the course of his judgment at page 33, his Lordship says: —

"The court therefore in this case must read into it the provisions of article 5(2) and (3) of the Constitution with the result that the applicant must be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice and if not released he shall without reasonable delay and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without a magistrate's authority."

In the light of the authorities cited above, I am of the opinion that the right of an accused person remanded in police custody, to consult and be defended by a legal practitioner of his own choice as embodied in clause (3) of article 5 of the Constitution, begins right from the day of his arrest even though police investigation has not yet been completed.

On the other hand, the law also requires the police to carry out investigation in order to satisfy the constitutional requirement of clause (1) of article 5 with a view to bringing offenders to justice. It is in that respect and towards that end that the fundamental right of the accused to consult counsel of his own choice should be subject to certain legitimate restrictions which necessarily arise in the course of police investigation, the main object being to ensure a proper and speedy trial in the court of law. Such restrictions may relate to time and convenience of both the police and the person seeking the interview. They should not therefore be subject to any abuse by either party, for instance, by the police in unreasonably delaying the interview or by counsel in demanding an interview at any time that suits him or by interference with investigation.

I must add here that in order to render such interview effective it should be held not within the hearing of any member of the police for under the law communication between the solicitor and client is privileged. It should however be within the sight of the police.

It should be mentioned that the view of the learned Legal Adviser does not seem to support the action taken by the respondent. I must say that the action of the respondent in restricting the learned counsel's application to interview his client on the expiry of the detention period is unreasonable. What the respondent meant was nothing more than "Well, you can see your client after I have completed my investigation during the remand period." It must therefore be understood that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

I must say something about section 117 of the Code having regard to clause (4) of article 5 of the Constitution. The section should be treated as an exception to section 28 which requires a police officer who has arrested a person without a warrant to produce him without unnecessary delay and in any case within twenty-four hours after arrest before a magistrate. The discretionary power to order the remand of the prisoner should be exercised sparingly because it requires the magistrate to record his grounds for making the order. The section contemplates more than one application for the remand order and the maximum period for remand as a whole is fifteen days. The magistrate should not allow the full period as a matter of course but should weigh the seriousness of the offence and determine whether a shorter period would be sufficient to enable the police to complete investigation. If so, such shorter period should be given. That would in a way help to hasten investigation to ensure a speedy trial and prevent the prisoner from being deprived of his fundamental liberty for a longer period than necessary. It comes as no surprise that the prisoner in this case has been released earlier.

The propositions as discussed above may be summarised as follows: —

(1) That the right of a person who is arrested and remanded in police custody, to consult and be defended by a legal practitioner of his own choice as envisaged in clause (3) of article 5 of the Constitution, begins right from the day of his arrest even though police investigation has not yet been completed;

(2) That in order to satisfy the constitutional requirement of clause (1) of article 5 that right should be subject to certain legitimate restrictions which necessarily arise in the course of police investigation, the main object being be ensure a proper and speedy trial in the court of law;

(3) That such restrictions may relate to time and convenience of both the police and the person seeking the interview and should not be subject to any abuse by either party;

(4) That in order to render such interview effective it should be held not within the hearing of any member of the police though within their sight;

(5) That the action of the respondent in this case in restricting the learned counsel's application to interview his client on the expiry of the detention period, is unreasonable;

(6) That it should therefore be understood that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

No order.

Solicitors: *Karpal Singh, Wong & Co.*

L. SDN. BERHAD v. COMPTROLLER GENERAL OF INLAND REVENUE

[F.E. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) September 21, 1972]

[Kota Kinabalu — Federal Court Civil Appeal No. 93 of 1971]

Income Tax — Deductions — Devaluation — Whether depreciation or fall in the value of money an allowable deduction — Onus — Income Tax Act, 1967, ss. 33 and 34.

In this case the taxpayer claimed a deduction for loss on sterling devaluation. This was disallowed by the Special Commissioners and the taxpayer's appeal to the High Court was dismissed. He thereupon appealed to the Federal Court.

Held: the taxpayer's case could not come within any of the provisions of sections 33 and 44 of the Income Tax Act, 1967 and as the taxpayer has failed to prove that the assessment was excessive the appeal must be dismissed.

Cases referred to:-

(1) *Charles Moore & Co. (W.A.) Pty. Ltd.* v. *F.C.T.* 95 C.L.R. 344.

(2) *Radio Paitress Ltd.* v. *Commissioners of Inland Revenue* 22 T.C. 106.

(3) *Texas Company (Australasia) Ltd.* v. *F.C.T.* 63 C.L.R. 382.

(4) *Davies* v. *Shell Company of Chin Ltd.* 32 T.C. 133.

FEDERAL COURT.

S. Woodhull (*Alex Khoo* with him) for the appellants.

Nik Saghir bin Mohamad Noor (Senior Federal Counsel) for the respondent.

Ali F.J.: This is a dispute between a taxpayer, L. Sdn. Berhad and the Inland Revenue Department over income tax assessment. In the usual course of events the dispute came before the Special Commissioners by way of an appeal from the taxpayer on the ground that the assessment was excessive. The Special Commissioners dismissed the appeal and confirmed the assessment. The question before the Special Commissioners, which I think has not been considered before is this: Is a depreciation or fall in the value of money an allowable deduction under the Income Tax Act, 1967?

The facts, not in dispute, are as follows: The taxpayer company was incorporated in Sabah in East Malaysia sometime in April 1964. In accordance with the object of its association, the company carried on business of buying lands from the North Borneo Timbers Ltd. in exchange for issue of shares by the company and selling them to others. For reasons of its own, the company remitted part of the proceeds of sales to England where it was held in deposit and current accounts in banks in London. The amount remitted, expressed in sterling, was £480,282. 12sh. 0d. The company was assessed to income tax for the accounting period from June 1, 1967 to May 31, 1968.

When sterling was devalued sometime in November, 1967, the taxpayer's money in London depreciated in value. The extent of the depreciation, expressed in Malaysian dollars, was $595,840, which appears in the company's profit and loss account for the year ending May 31, 1968 as an item of expenses described as "Loss on Sterling Devaluation". Maintaining that this was an allowable deduction, the taxpayer objected to the tax assessment.

The taxpayer's appeal to the Special Commissioners as already stated was dismissed. The Special Commissioners held that in the circumstances of this case the loss was not an allowable deduction under the Income Tax Act, 1967. A further appeal to the High Court at Kota Kinabalu met with the same result. Hence this appeal.

The taxpayer sought to bring its case within the Income Tax Act, 1967 by relying, mainly, on cases decided in Australia and in England. In their grounds of decision in Annexure 'D' to the case stated for the opinion of the High Court the Special Commissioners pertinently pointed out that the taxpayer did not seem to rely on any specific provision of the Act. Needless to say that the dispute in this appeal necessarily falls to be governed by the Act. The Special Commissioners, however, considered sections 33 and 44 of the Act and were satisfied that the taxpayer's case could not come within any of those provisions. I incline to the same view. A number of cases were also considered by the Special Commissioners who distinguished them. In particular, they considered *Charles Moore & Co. (W.A.) Pty. Ltd.* v. *Federal Commissioner of Taxation*[1] *Radio Pictures Limited* v. *Commissioners of Inland Revenue*[2] and *Texas Company (Australasia) Limited* v. *Federal Commissioner of Taxation.*[3] In the final analysis they concluded that the taxpayer failed to discharge the onus of proof as laid down in paragraph 13 Schedule 5 to the Income Tax Act.

One of the major questions which arose before the Special Commissioners was whether the taxpayer's money in London was fixed capital or circulating capital. It seems agreed that in the light of decided cases if the money in London was circulating capital the loss would be an allowable deduction. It would be otherwise if it was fixed capital. I find it necessary to observe that the expression "fixed capital" or "circulating capital" is nowhere used in the Income Tax Act, 1967. In terms of section 4 of that Act, gains or profits are chargeable income. The mode of ascertaining chargeable income is set out in section 5. I do not propose to consider any of these provisions in extenso except to say that one way of ascertaining chargeable income is to find out adjusted income as provided in section 33, or adjusted loss as provided in section 40 of the Act. Quite plainly, I think the taxpayer would not find it easy to bring its case within any of these provisions. Hence the contention that the money was circulating capital. The Inland Revenue